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**THE INDEPENDENCE OF PROSECUTORS IN EUROPE:
WHERE ARE WE GOING?**

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The independence of Public Prosecution in Europe: from enshrining principles in the Charters to experiencing Rule of Law disrupting reforms

“There have been times and places in which the central protagonist of criminal justice, the officials most responsible for the fairness and effectiveness of penal administration, have been judges. Today the pivotal figures in criminal justice systems throughout the world appear, more and more, to be prosecutors”.

With this foreword, Máximo Langer and David Slansky introduce the contributions edited and collected in their volume *Prosecutors and Democracy*¹.

In recent years, these are the two keywords around which debate has unfolded about Public Prosecution and the pressing questions arising from its ever-growing role and discretionary power as well as from its crucial positioning *vis-à-vis* the overall functioning of the justice system and the Rule of Law: what are the necessary guarantees and the minimum standards of external and internal independence that the role of Prosecutors in a democracy requires? Which are the necessary checks and balances in terms of legitimacy and accountability?

The principles

Starting from these questions and the sometimes-striking differences between national systems in terms of institutional positioning and statute, a continuing effort of elaboration over the years has produced *a shared European vision of the Public Prosecution’s identity*. Rather than ideally constructed as an abstract prototype, this is mainly modelled after the function it performs in a democracy and its role *vis-à-vis* that of jurisdiction.

By stipulating principles, European Charters, recommendations and soft law outline the features of the Public Prosecution as a *justice body, promoter of human rights* that acts *“on behalf of society and in the public interest to respect and protect human rights and freedoms as laid down, in particular, in the Convention for the Protection of Human Rights and Fundamental Freedoms and in the case-law of the European Court of Human Rights”*: a Public

¹ M. Langer and D.A. Sklansky, *Prosecutors and Democracy. A Cross-National Study*, Cambridge University Press, Cambridge, 2017.

Prosecution that contributes to the *fair, impartial and efficient administration of justice*, as reaffirmed by the so-called *Rome Charter* (Consultative Council of European Prosecutors, opinion no. 9 (2014), *on European norms and principles concerning prosecutors*).

Public Prosecution is no longer intended as a mere guardian of legality and compliance with criminal laws: it is a promoter of democratic values such as the principle of equality before the law. As Luigi Ferrajoli wrote, this is the Public Prosecution living up to the *new constitutional paradigm* of our democracies and to the function of protecting fundamental rights and freedoms entrusted to jurisdiction. This is the Public Prosecution that operates within the framework of a constitutional Rule of Law posing limitations and constitutional constraints to the public sphere in order to protect rights and freedoms.

As the cornerstone of an independent judicial system, Public Prosecution shall be independent and democratic: since the Palermo Declaration in 1993 and Naples Declaration in 1996, MEDEL has stressed this unavoidable connection, nowadays transfused in the European Charters where actual *independence* of Prosecutors is defined as the necessary *corollary to the independence of the judiciary* and *a further safeguard in maintaining the independence of judges*².

For this very reason, MEDEL has always invoked – as a key element of a *European Statute for the Judiciary* - the existence of a concurrent legal framework for judges and prosecutors - *with equivalent statute, rights and guarantees* – ensuring that the Public Prosecution structure is fully compliant with the Rule of Law. In MEDEL’s view, this can only be achieved through prosecutorial self-governing bodies and the continuous monitoring of common standards of independence by European institutions.

These are all shared principles by now: as recently highlighted in the CCPE opinion no. 16 (2021), against the very diverse European backdrop, “*the most important convergence factor, and one that really brings all the [...] European systems together, is the requirement of the independence of the prosecution services as a prerequisite for the Rule of Law and the independence of the judiciary*”. Additionally, as MEDEL had wished for, the recent recommendations included in the latest CCPE opinion no. 18 (2023), on the institution of *Councils of Prosecutors, as self-governing bodies, for securing the effective and impartial functioning of the prosecution services and individual prosecutors through their independent decision-making*, also point in the same direction.

² *Joint report on challenges for judicial independence and impartiality in the member states of the Council of Europe*, adopted in 2016 by the Bureaus of CCJE and CCPE.

From shared principles to experience: Public Prosecution in the common area of Justice

Experience has shown that the current supranational dimension of justice in Europe fostered a further *shift of paradigm* for Public Prosecution and its institutional framework.

Mutual trust between national public prosecution services is key to ensure the proper functioning of the Area of Freedom, Security and Justice. Prosecutors are part of the *dialogue* between national and European Courts. “*Not less than defence lawyers, they can trigger in judges the «réflexe communautaire» and catch any questions underlying the particular case submitted to their attention that are likely to breach fundamental rights or the Rule of Law in order to attract the court’s attention about the need to request a preliminary ruling of the CJEU*”. After the implementation of the advisory-opinion procedure set out in Protocol n.16 to the European Convention on Human Rights, this mechanism of *dialogue* is also applicable to the Strasbourg Court³.

The common legal space based on mutual trust between the judiciaries of EU Member States implies a constant review of their actual capacity to ensure the same level of protection of fundamental rights, shaping a system that involves national courts, too, in this process. The capacity of prosecutors to act independently thus becomes one of the lenses through which one must read the radically new legal *environment* created by the common area of justice and assess whether the organizational solutions offered by different legal systems are compatible with the power of Public Prosecution to exercise impartially functions that affect fundamental rights and freedoms and its capacity to act as the first guardian of fair and impartial decisions.

Such assessment has been developed in ECJ decisions concerning the definition of *judicial authority* for the purposes of the European Arrest Warrant and the appraisal of the statutes of those national Public Prosecution services organised according to a hierarchical structure and subject to external powers, such as those of the executive via the Minister of Justice, when he can exercise supervision, direction and instruction powers, in a specific case, thus influencing the decisions of public prosecutor’s office.

The Rule of Law backsliding in Europe

³ L.Salazar, *Prosecutors’, Heads and Members of Prosecutorial High Council’s Perspective*, in *Rule of Law in Europe. Perspectives from Practitioners and Academics*, EJTN, Bruxelles, 2019; L.Salazar, *La funzione requirente nel rapporto EJTN sullo Stato di diritto in Europa*, *Questione Giustizia*, 2/2021, p. 85; *Pubblico Ministero e Stato di diritto in Europa*, <https://www.questionegiustizia.it/rivista/pubblico-ministero-e-stato-diritto-in-europa>.

Mutual trust requires a framework of minimum standards of a truly democratic and independent prosecution service. However, the current European landscape challenges the vision of a Public Prosecution service living up to the *new paradigms*, that describe the Prosecutor as an actor of the justice system in the framework of the democratic Rule of Law, with a key proactive role in the supranational dimension that justice and its overall architecture have acquired.

This does not only happens in those national contexts where instability, incompleteness and a structural lack of minimum-standards of independence persist. It is also true where strong statutory guarantees are in place, such as the complete detachment of Public Prosecution from the executive power and its full inclusion in the judiciary, as the Italian Constitution came to enshrine in the aftermath of the Fascist era. In such contexts, too, radical and retrogressive reform projects are now a priority on the political agenda.

In recent years, in Europe, we have experienced directly how the institutional arrangement of public prosecution can be aggressively and strategically exploited to modify institutional balances to the advantage of the executive power, providing it with a firm grip on the machinery of justice and the exercise of core judicial functions, and thus questioning the very existence of a supranational judicial architecture for the protection of the Rule of Law.

Poland represents the most evocative example of such processes. Soon after the “capture” of the Constitutional Court, the *prokuratura* reform in 2016 blocked and reversed the building of an independent and democratic Public Prosecution service started in 2009 and reunified the role of Minister of Justice with that of Prosecutor General. This entailed a concentration of power resulting in the elimination of all forms of internal independence of prosecutors and transformed the Prosecution Office into “*a military-like system, with submissive prosecutors promoted to higher offices (without any competitive process and in a purely discretionary way, contrary to the practice before 2016) while recalcitrant ones were punished with demotion [...] to lower positions*” or transferred to other offices⁴. Together with increased external prerogatives in the *maintenance of law and order*, all this deeply impacted on the separation of powers and, thus, on democracy.

The report *The Stick Method – The “good change” system of persecuting independent prosecutors*, issued on 21 July 2021⁵ by “Lex Super Omnia”, the Polish prosecutors association member of MEDEL, describes an impressive number of transfers and sanctions related to this

⁴ W.Sadurski , *Poland’s Constitutional Breakdown*, Oxford University Press, 2019, p. 126.

⁵ <https://lexso.org.pl/2021/07/21/the-stick-method-the-good-change-system-of-persecuting-independent-prosecutors/>

systematic persecution. The new Public Prosecution organisation proved functional to exercising control and pressure on judges, also via the Internal Affairs Department of the State Prosecution service, one of the central bodies handling proceedings against Polish judges. This reform was also conducive to the attainment of the more general purpose of challenging a system based on the primacy of EU law and the European Convention on Human Rights by introducing sanctions for those judges who reaffirmed this primacy also through the *dialogue* with the European Courts and using the procedure of preliminary ruling.

But in all contexts, where and when the Rule of Law proves unstable, it is the structure of prosecution that easily becomes the key to a covert transfer of prerogatives to the executive branch or to pressures on the judges. Let us just mention the remarks of the Venice Commission, the decisions of ECtHR on the deficiencies of the structure and role of Prosecution in Bulgaria, that appeared as functional to the merging rather than to the separation of powers, with unreasonable broad prerogatives and lack of accountability, in a context of huge pressure on judges.

Future perspectives for the independence of the Public Prosecution service in Europe. The European Public Prosecutor's Office

Where are we going?

Today's European landscape is contradictory and diverse as far as different organisational solutions for the Public Prosecution service are concerned. Against this backdrop, what are the perspectives for the realisation of our ideal of a Public Prosecution capable of facing the challenges posed to the Rule of Law and democracy in Europe and the growing demands for justice? What future lays ahead for a Public Prosecution, guarantor and promoter of fundamental rights - requiring external and internal independence, transparency and impartiality, legitimacy and accountability - bound to expand its role to the protection of common goods and the response to serious crimes, such as systemic corruption, that endanger the democratic values and the institutional interests connected to the very existence of the EU? In the common area of Justice, and in the framework of a community held together not by a common military or police force, but by the Rule of Law (as in the words of CJEU judgment *Les Verts*), building a model of European Public Prosecution based on common standards of external and internal independence remains our necessary perspective. However – and the Italian case is there to confirm that – it is still strongly believed that all choices relating to the institutional positioning of the Public Prosecution service and to its statute fall within the *domaine réservé* of each member State. It is so much so that (again with reference to Italy and

the project to dismantle our current system) no relevance whatsoever is attributed to the fact that the European Public Prosecutors' Office, as a new institution taking the stage of the European justice architecture, draws considerable inspiration also from the Italian model of Public Prosecution service and its experience.

In the fragmented European legal system, the EPPO is the new breakthrough actor conceived by its establishing Regulation as a strongly independent supranational institution whose democratic legitimacy rests upon its accountability and the internal and external transparency, fairness and efficiency mechanisms aimed at ensuring that prosecutorial functions are exercised independently and impartially according to proportionality and the Rule of Law (as per its Regulation).

“Independence is one of the EPPO’s main, if not its most important, feature. It is an essential guarantee against abuse of power, which is not only in the prosecutors’ own interests but also in the interest of society itself and in the interest of the Rule of Law”⁶.

An integral part of the EPPO and the vehicle through which the latter is connected to national legal systems, European delegated prosecutors shall act exclusively in its name and behalf and be granted a functionally and legally independent status, different from any status under national law (cons. no. 32).

This hybrid organisational structure is the result of a mediation between defenders of national sovereignty and promoters of a fully integrated Europe. EPPO, however, paves the way to our perspective of a full integration of national structures and systems based on common standards of independence. A few months before it became operational, the Prosecutor General at the French Court of Cassation, François Molins, and the honorary Attorney General Jean-Louis Nadal, highlighted that the establishment of the EPPO and its full integration into the French system with its statute of independence would have posed once again the question of the “necessary statutory independence of the French *parquet* in terms of ensuring both the proper administration of justice and the equality of all citizens before the law. From now on - they declared – individuals will benefit from different guarantees of independence of the judicial authority, depending on whether the offence perpetrated is harmful to the financial interests of the Union or not”⁷.

⁶ M.C. Sabadell Carnicero, *The Independence of the European Public Prosecutor’s Office*, <https://eucrim.eu/articles/the-independence-of-the-european-public-prosecutors-office/>

⁷ F. Molins, J.-L. Nadal, *Il est urgent de garantir l’indépendance statutaire des magistrats du parquet*, *Le Monde*, 2 September 2020

This institution owes to the visionary thought of Mireille Delmas-Marty. It is worth concluding by recalling her words: “An independent European Public Prosecutor's Office, which both enjoys legitimacy from the Rule of Law standpoint (improved judicial control) and is effective in a globalised world (strengthened powers) could not only consolidate the European Rule of Law, but also harmonise the justice systems of its Member States without standardising them. From one Prosecutor to another, the young European Public Prosecutor could then herald a future world legal order, pluralist and yet structured, of which it would become an actor”⁸.

Great challenges lay ahead of us, as great are our responsibilities. The supranational perspective we enjoy by looking beyond our national borders, grounded on our common commitment to the Rule of Law and the shared ideal of an independent Public Prosecution service as a guardian of fundamental rights, is what may help us most to live up to our task.

⁸ M.Delmas-Marty, *Le parquet européen pourrait préfigurer un futur ordre juridique mondial*, *Le Monde*, 6 October 2020.